

ARKANSAS COURT OF APPEALS

DIVISION I

No. CA08-1310

JEANNE HUDGENS,

APPELLANT

V.

KIRK MARTIN,

APPELLEE

Opinion Delivered 3 JUNE 2009

APPEAL FROM THE UNION
COUNTY CIRCUIT COURT,
[NO. DR-2004-0104-02]THE HONORABLE JOHNNY R.
LINEBERGER, JUDGE

AFFIRMED

D.P. MARSHALL JR., Judge

The circuit court changed custody of the parties' young son, J.M., from the child's mother, Jeanne Hudgens, to his father, Kirk Martin. The court based its decision largely on Hudgens's instigation of several unfounded abuse allegations against Martin and the effect that those allegations were having on J.M. Hudgens presses two arguments on appeal. She says that the circuit court erred in finding a material change in circumstances. And she contends that, even if the circumstances were materially different, changing custody was not in J.M.'s best interest.

"It is well settled in Arkansas that a judicial award of custody will not be modified unless it is shown that the circumstances have changed such that a modification of the decree would be in the best interest of the child." *Stehle v. Zimmerebner*, 375 Ark. 446, 454, ___ S.W.3d ___, ___ (2009). Martin, the party seeking modification, had the burden of proving a material change. *Ibid.* We

consider, on the record as a whole, whether the circuit court “clearly erred in either making a finding of fact or in failing to do so.” *Stehle*, 375 Ark. at 456, ___ S.W.3d at ___. In making this determination, we defer to the circuit court’s superior position to gauge all the witnesses’ credibility and determine the weight of each witness’s testimony. *Stehle*, 375 Ark. at 454–55, ___ S.W.3d at ___.

Material Change in Circumstances. As part of this point, Hudgens argues first that the circuit court erred in limiting the testimony at the June 2008 change-of-custody hearing to the time period after the parties’ August 2007 temporary hearing on visitation. We disagree. The court entered its last custody order, which granted Hudgens custody, in February 2005. Then, in August 2007, the court held a hearing on Martin’s petition about visitation. At the June 2008 change-of-custody hearing, without objection from Hudgens, Martin entered the transcript of the 2007 hearing into evidence. The circuit court thus had the benefit of the testimony presented at the 2007 hearing, which covered the period after the entry of the 2005 custody order. Rather than walk the same ground again, the circuit court properly limited the testimony at the 2008 hearing to events occurring since the 2007 hearing. We see no error because the court had all of the post-2005 evidence under consideration when it decided to change custody. *Stehle*, 375 Ark. at 454, ___ S.W.3d at ___.

We turn next to Hudgens’s material-change argument. In *Swadley v. Krugler*, our court held that the mother’s continuous and unfounded sexual abuse allegations

against the father provided sufficient evidence of a material change in circumstances. 67 Ark. App. 297, 303, 999 S.W.2d 209, 213 (1999). In *Sharp v. Keeler*, we held that the mother's continued efforts to alienate the father from the child constituted a material change in circumstances. 99 Ark. App. 42, 55, 256 S.W.3d 528, 537 (2007). There is no *per se* rule, however, that a parent's unfounded abuse allegations and alienation efforts necessarily warrant a change in custody. *Kerby v. Kerby*, 31 Ark. App. 260, 265, 792 S.W.2d 364, 366 (1990). Instead, change-of-custody decisions "must be based on the particular facts and circumstances of each case, in relation to the standard of the best interest of the child." *Ibid.*

The circumstances presented here were these. Before the August 2007 hearing about visitation, two sexual-abuse allegations had been lodged against Martin regarding J.M.—one by Hudgens and another by J.M.'s therapist. The State Police investigated and determined that both these allegations were unsubstantiated. After the August 2007 hearing, someone from the Medical Center of South Arkansas made a third call to the child-abuse hotline, again alleging that Martin had sexually abused J.M. At this point, Martin filed his petition to modify the custody order. In his petition, Martin continued to deny any wrongdoing and pleaded that "the allegations are being made toward [Martin] and his [new] wife out of vengeance, cruelty, and with malicious intent to harm [Martin] and to interrupt his relationship with both his wife and his child."

Hudgens testified that, sometime after the August 2007 hearing, she took J.M. to the hospital because he “was describing sexual acts.” As a result, the hospital staff called in another report of child abuse against Martin. Hudgens was thus the catalyst for this third report. She acknowledged that neither the Arkansas State Police nor DHS had ever made a finding of maltreatment. Nevertheless, Hudgens admitted that she had told at least three people since the August 2007 hearing that Martin was abusing J.M. We affirm the circuit court’s ruling here: under *Swadley* and *Sharp*, Hudgens’s barrage of unfounded abuse allegations against Martin was a material change in circumstances.

Best Interest. In its order, the circuit court also found that the circumstances had changed so dramatically that “it would no longer be in the best interest for the child to be in the mother’s primary care and custody.” The court based its decision on the fact that, despite no evidence of abuse, Hudgens continued to make abuse allegations. The court concluded that the continuous allegations “hurt [J.M.]” and that having J.M. “go in . . . to talk to all of these people, that’s not in his best interest.” The court said that, until Hudgens accepted that no abuse had occurred, “[i]t’s just simply not going to get any better.” The testimony and evidence presented at the hearing support the court’s conclusion.

Two independent psychologists—Dr. Deyoub and Dr. Garrett—evaluated J.M., Martin, and Hudgens. Both psychologists concluded that Martin had not sexually

abused J.M. In fact, Dr. Garrett and Martin both testified that J.M. had told them that his mother had coached him to make the allegations. Dr. Garrett further opined that Hudgens seemed to believe the allegations. And Dr. Deyoub noted that Hudgens's abuse allegations "have been continuous and were present even during the time of the evaluation," which occurred in February 2008.

Both psychologists noted that J.M. exhibited both emotional and behavioral problems, which they both attributed largely to Hudgens. The psychologists were both concerned the allegations would continue. In fact, Hudgens herself testified that she still believed "there's a possibility that something happened." The psychologists' worry was that J.M. would eventually begin to believe the things Hudgens was telling him about the abuse. Dr. Deyoub went as far to conclude that "the sexual allegations are . . . affecting [J.M.'s] mental health."

Dr. Deyoub and Dr. Garrett also agreed that Hudgens likely had a personality disorder. And Rhonda Rudder, Martin's ex-wife and Hudgens's friend, testified that Hudgens had told her that she would kill herself if she lost custody of J.M.—a statement Hudgens confirmed. Rudder said that she believed Hudgens and even told Hudgens's preacher about this statement. Hudgens, however, said that she did not really mean it.

Hudgens emphasizes the evidence of record against a change of custody. She had been the boy's primary caretaker since birth. In years' past, Martin often chose to

work out of town, which interfered with his visitation. In addition, the circuit court granted Hudgens more than standard visitation, which Hudgens argues belied its finding that changing custody was in J.M.'s best interest. Both Hudgens and Rudder testified to their concerns about the lifestyle and values of Martin and his current wife. Hudgens also faults the circuit court for excluding some testimony about Martin's behavior, but then mentioning her proffer in the bench ruling. Our review of the record convinces us, however, that the circuit court weighed all the evidence of record and did not rest its decision on excluded testimony.

Both Dr. Garrett and Dr. Deyoub recommended changing custody. In his report, Dr. Deyoub concluded that "there is a major problem with Ms. Hudgens retaining custody. She is harming this child" In light of all of the circumstances, the attorney ad litem also recommended changing custody. We conclude that the clear preponderance of the evidence supports the circuit court's thorough and careful decision to make J.M.'s father the boy's primary custodian.

Affirmed.

PITTMAN and HENRY, JJ., agree.